No. 13,135

IN THE

United States Court of Appeals

For the Ninth Circuit

WATERMAN STEAMSHIP CORPORATION, a corporation,

Appellant,

vs.

SHIPOWNERS & MERCHANTS TOWBOAT CO., LTD., a corporation, and Tug SEA FOX, INC., a corporation, on their own behalf and on behalf of the Master, Officers and Crew of the Tug Sea Fox,

Appellees.

BRIEF FOR APPELLEES.

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BRIEF FOR APPELLEES.

PRELIMINARY STATEMENT.

Appellant's statement as to the admiralty jurisdiction of the District Court and the appellate jurisdiction of this Court of Appeals is entirely correct. Its "statement of the case" is generally correct as far as it goes, although slightly colored in one or two places. We accept the gage of battle as laid down in appellant's statement of the issues involved, and, with one exception, will discuss appellant's specifications in the same order in which they are presented in its opening brief.

The exception relates to the issue of the tug's exoneration from responsibility for fault. As we see it, both the language of the towing contract *and* the over-all contractual arrangements operate together to prevent the tug's conduct being called into question. Appellant has separated this issue into two parts, however. Its first specification of error (pp. 8-9 of its opening brief) discusses solely the language of the towage contract, while the insurance arrangements are discussed under the fourth specification (appellant's opening brief, pp. 40-42).

Since both the towing contract and the insurance arrangements operated together to shield the tug from a charge of negligence, we believe that both should be discussed together, and we propose to do so in this brief.

With that one exception, we will answer appellant's points in the same order as they are presented in its opening brief.

ARGUMENT.

I.

THE TOWAGE ARRANGEMENTS LEGALLY EXONERATED THE TUG FROM RESPONSIBILITY FOR ERRORS IN NAVIGATION OF TUG AND TOW.

Appellant's first specification (appellant's opening brief, pp. 8-9) argues that a clause in a towage contract exonerating the tug from liability for negligence is void, citing *Compania de Navigacion v. Fireman's Fund (The Wash Gray),* 277 U.S. 66, 72 L. Ed. 787, and *Mylroie v. Brit. Col. Mills,* 268 Fed. 449 (9th Cir.).

The latter case went to the Supreme Court, which decided the cause upon other grounds, the Supreme Court saying:

> "This makes it *unnecessary* for us to consider the contention on behalf of the barge, that the exemption clause is void."
>
> *Brit. Col. Mills v. Mylroie,* 259 U.S. 1, 12; 66 L. Ed. 807, 814.

The Wash Gray, 277 U.S. 66, 72 L. Ed. 787 (supra), held ineffective a clause that towage was at the risk of the tow, but did so in such terms that it is not entirely clear whether the Supreme Court meant to hold that the clause should not be construed, as a matter of language, to provide for exoneration for negligence, or to hold that such an exonerating clause is void as a matter of law.

We have no intention, however, of trying to argue the issue of whether a tug can validly stipulate for complete exoneration from the consequences of its own negligence, since that issue is not presented here. The clause here in question is not a blanket one, but is limited in scope and effect. And, coupled with that clause, there is the matter of insurance arrangements knowingly made by all parties.

In considering the validity of these arrangements, it should be kept in mind that a tug is not a common carrier, and *is not even a bailee. Stevens v. The White City,* 285 U.S. 195, 76 L. Ed. 699.

The first point to be noted is that the clause here in question is confined to "faults or errors in the navigation or management of tug and tow" (clause 4 of towage con-

tract. Apostles, 292). The clause is worded precisely within the exemptions which are granted even to common carriers, by the Harter Act (46 U.S. Code 192) and the Carriage of Goods by Sea Act (46 U.S. Code 1304).

While carriers are given the right by statute, these statutes evidence a public policy in favor of such exonerations which should apply here to sustain the validity of the relieving clause in the towage contract.

Limited exoneration clauses have been upheld in a number of situations. Thus, in *New Haven Trap Rock Co. v. U. S.*, 15 F. Supp. 619 (D. Mass.) the contract between scow owner and respondent provided that respondent should be responsible for all accidental damage to the scow except such as is ordinarily covered by insurance. The clause was held effective to relieve respondent for insurable damage caused by its negligence.

In *Berwind-White Co. v. U. S.*, 15 F. (2d) 366 (2nd Cir.), a demise charter (i.e., a *bailment*) provided that the barge owner assumed marine and other risks, including P. and I. risks. While in the Government's possession as bailee, the barge was damaged by the negligence of an Army tug. The clause was held valid to relieve the Government from liability.

The history of the contractual arrangements in this case is shown in the record as follows:

On October 27, 1948, the Maritime Commission offered to sell the *Herald* to Waterman for the statutory price, less various allowances for converting her back to merchant type, on condition that Everett-Pacific Co. get the

reconversion job and be named as an assured on the hull policies during transfer of the vessel from the San Francisco Bay area to Everett, Wash. (Apostles, 278-9.)

Waterman accepted this proposal by telegram of October 28, 1948 (Apostles, 280), and, on the same date, wired Everett-Pacific that they could have the reconversion job if they agreed to transfer the vessel at their expense. (Apostles, 281.) Everett-Pacific accepted this offer the same day, their reply telegram to Waterman saying, "expense of preparing for tug and towing for our account except *insurance,* which for *your* account * * *" (Apostles, 282.)

On October 29, 1948, the Commission, by telegram, confirmed Waterman's understanding that Waterman was to cover the *Herald* by marine insurance, naming Everett-Pacific as a co-insured, and that *Waterman's expense for such insurance would be allowed as a further deduction from the price it would owe to the Commission.* (Apostles, 283.)

Then Sudden & Christenson, San Francisco agents for Waterman, wired Everett-Pacific on October 29, 1948, that they were willing to act as agents of Everett-Pacific in preparing the *Herald* for towing, and requested Everett to send two copies of the towage agreement, "this *necessary* satisfy salvage association and *enable owner arrange towage risk insurance;* we believe *standard* form towage contract is *with release of tug from any and all liability* * * *" (Apostles, 284.)

On November 1, 1948, the towage contract was made between libelant and Everett-Pacific, represented by Sud-

den & Christenson. Paragraph 8 of that towage contract (Apostles, 293) provided that:

> "By endorsement thereon or otherwise, and without any right of subrogation against it, First Party (i.e., libelant) shall be made an additional assured in Second Party's insurance policies covering the tow * * * during the towage service, and, if Second Party does not so add First Party as an additional assured, or fails to provide for the aforesaid waiver of subrogation or fails to insure the tow, then Second Party agrees to be the insurer thereof for both parties. * * *"

The policy itself, No. 48-1299, is in evidence as libelant's exhibit 5 (not printed). It is issued by American Hulls Syndicate and covers several ships, including the *Herald,* the *Young America* (previously towed by the *Sea Fox* from San Francisco to Everett) and the *Dashing Wave.* It covers salvage services rendered to any insured vessel, even though rendered by another vessel belonging to the assured, and, by indorsement, names Pacific Car & Foundry Co., doing business as Everett-Pacific Shipbuilding Co., as an assured in addition to Waterman.

The policy does not name Shipowners as an assured, but does contain these significant features:

1. As admitted by Waterman in answer to interrogatories (Suppl. Apostles, 381-2), an addendum to the policy provided that trip in tow premium for marine risks was "1⅛% (*with release of tug*), or 1% (*no* release of tug)." In fact, the higher rate of 1⅛% *was paid* by Waterman to the insurers.

2. Another addendum to policy 48-1299 (libelant's exh. 5) covers various trips in tow made by the *Herald,* such as from the lay-up berth in Suisun Bay to Moore Drydock, San Francisco, and from there to Pier 16, War Assets, Oakland. For the trip from Oakland to Everett, this addendum increases the insured value to $1,054,000, states a premium of 1⅛%, or $11,857.50, and bears the notation, *"Towing tug and/or tugs released of liability."*

In answers to interrogatories (Apostles, 34-36), Waterman admitted as follows:

1. That "pertinent particulars of towage arrangements and contract were furnished *by Waterman* to *its* brokers *who arranged the insurance."* (Suppl. Apostles, 384.)

2. That Article 25(b) of the reconversion contract between Waterman and Everett-Pacific exonerated the latter from liability for damage to the *Herald* during the trip caused by negligence of Everett-Pacific *or its subcontractors.* (Apostles, 382-3.)

Thus we have here no contract depriving an uninsured shipowner of recovery from a negligent tug, in any sense. We have a case where, in order to avoid controversies among themselves, the interested parties agreed to take out full insurance to protect *all* interests, and waived any claims back and forth among themselves, all with the knowledge and consent of the insurers, who issued the policy knowingly, and *who charged and received a higher rate of premium for waiving subrogation against the tug.*

In summary:

1. Waterman agreed with Everett-Pacific to waive claims against the latter, and obtained insurance covering both their interests during the *Herald's* trip up the coast.

2. Everett-Pacific (represented by Sudden & Christenson, who were also Waterman's agents) agreed with libelant to release the latter from responsibility for errors in management and navigation, and agreed to have libelant endorsed on the hull policies as an assured or to obtain a waiver of subrogation.

3. Waterman advised its brokers of the terms of the towing contract and, presumably, the brokers so notified the underwriters, since the policy and its attachments show that the movement was "towing tug released from liability," and that *a higher rate was charged and received by the insurers from Waterman for thus waiving claim against the tug.*

In other words, the contractual arrangements as a whole amounted both to a waiver by the underwriters of the right to hold the tug for negligence, and an agreement by Waterman and Everett-Pacific to give the tug the benefit of their insurance. Both types of agreement are valid and enforceable.

It is a general principle of law that parties to a contract can always avoid controversies between themselves by agreeing to take out insurance to cover possible losses. Even a common carrier can lawfully stipulate for the benefit of the shipper's insurance. *Phoenix Ins. Co. v. Erie & W. Transp. Co.*, 117 U.S. 312, 29 L. Ed. 873. The

decision in *Luckenbach S. S. Co. v. McCahan Co.,* 248 U.S. 139, 63 L. Ed. 170, recognized this rule, and refused to apply it *only* because the policy *prohibited* such a clause, and the money was not "paid," but was "advanced" to the shipper under a loan receipt.

In this case there was an express *consent* by the underwriters to the tug's receiving the benefit of insurance, since a higher rate was quoted for releasing the tug from responsibility, and that *higher rate was actually paid.* The case is thus analogous to *Newport News Co. v. U. S.,* 34 F. (2d) 100 (4th Cir.) (Cert. den. 280 U.S. 599, 74 L. Ed. 645), where the agreement of the shipowner to keep hull policies in force was held to exonerate a repair yard from liability for negligently causing fire damage to the vessel.

At pages 40-41 of its opening brief, appellant Waterman points out that it was not a party to the towage contract between Everett-Pacific and libelant, and professes to be unable to answer the estoppel argument which libelant made below. That statement ignores the realities of the situation and the history of appellant's own actions in this case.

Next, appellant offers the amazing explanation that it paid an insurance premium of "1⅛% with release of tug" rather than "1% no release of tug", because, although such an exonerating clause in the towage contract is void, it costs money for legal expenses in getting the Court to rule the clause invalid, and that is why the insurers charge more premium when the towage contract contains such a release!

This contention is so naive that it is difficult to take it seriously. It does confirm what libelant has contended throughout—that the hull underwriters, not Waterman, are the ultimate party in interest here, since the policy covers salvage charges incurred by the *Herald* on this trip. Waterman can hardly claim that it paid a higher premium *to* the underwriters because it, Waterman, would have an extra legal expense in setting aside the release-of-tug clause. If its argument means anything, it means that underwriters charged a higher premium because *they,* the underwriters, would have extra legal expense in setting the clause aside.

Thus appellant's explanation of the extra ⅛ of 1% charge is an admission that underwriters, not Waterman, are defending this case and will have to pay the salvage award to libelant. And appellant is thus arguing, in effect, that the underwriter didn't really mean it when he noted "towing tug released from liability" on the addendum to the policy that covered this trip. The law permits an insurer to waive subrogation, and that is exactly what the underwriters did here, with full knowledge and in exchange for a higher premium, whose amount they, themselves, fixed.

At the risk of being repetitious, let us set down briefly what appellant, itself, did:

1. Waterman released Everett-Pacific from liability during the trip and had that company added as a named assured on the policy.

2. Waterman requested copies of the towing contract, so that it could arrange for insurance, stating that it was

understood the standard towing contract provided for release of tug.

3. After learning of the towage contract and the release clause therein, Waterman gave this data to its brokers to get the necessary policy endorsements.

4. The underwriters named a figure of 1⅛% as the premium required if the tug was released from liability, and Waterman paid that premium.

As to the underwriters,

(a) They knew that the towage contract released the tug, and that it contained an express agreement by Everett-Pacific (a named assured) to give libelant the benefit of the insurance.

(b) With this knowledge, they quoted a premium of 1⅛% instead of the 1% which they would have charged if there had been no release of the tug.

(c) They accepted this higher premium.

(d) On the policy endorsement covering this trip in tow they placed a notation, "towing tug released from liability."

Thus one of the named assureds (Everett-Pacific), with the knowledge and consent of the other (Waterman), formally agreed to give libelant the benefit of the insurance, while Waterman paid the insurers an extra premium to waive subrogation against the tug, and the insurers knowingly charged and accepted that higher premium and *waived subrogation* in writing on the policy.

We submit that, as the just and intended result of these dealings, both Waterman and the underwriters are

estopped from questioning the tug's conduct either by way of cross-libel or by way of attempted defense to libelant's claim for salvage.

II.

THE DISTRICT COURT PROPERLY FOUND THAT CAPT. SOMMER'S FAILURE TO HOLD A MASTER'S LICENSE FOR THE HIGH SEAS DID NOT AND COULD NOT HAVE CONTRIBUTED TO THE CIRCUMSTANCES GIVING RISE TO SALVAGE SERVICES.

Appellant's second specification refers to Section 224a of Title 46, *U. S. Code,* and argues that, under the "*Pennsylvania* rule", libelant failed to discharge the burden of proving that Capt. Sommer's lack of ocean-going license could not have had any causal relation to the situation in which salvage services became necessary. (Capt. Sommer had a Master's license for Bays and Rivers, but not for Oceans.)

Our first observation is that it is by no means clear that even a technical violation of 46 *U. S. Code* 224a took place. Article 3 of the Convention (1938 A.M.C. at 1285) merely requires the officers to hold "certificates of competency." Section 224a of 46 *U. S. Code,* subsec. 3, provides that *any* license issued to a master *shall be deemed a certificate of competency within the requirement of the Convention.* Also, Section 224a continues in effect all previous laws concerning licenses "to such extent and upon such conditions as may be required by the regulations of the Commandant of the Coast Guard."

The regulations of the Coast Guard (46 C.F.R. 62.19) state that "There shall be a duly licensed master on board every *steam* vessel of more than 150 gross tons, or seagoing *motor* vessel of *300 gross tons or over* * * * and also upon every ocean and coastwise seagoing merchant vessel * * * and every ocean-going vessel carrying passengers * * *"

The *Sea Fox* is a *motor* vessel (diesel tug) of 282 gross tons (Finding III, Apostles 56) and, being a tug, is not a merchant or passenger vessel as such. Hence it was not required by the quoted regulation to have a licensed master aboard.

In short, no violation of the Convention or statute took place because:

1. There was aboard an officer with an unlimited master's license (Reichel), who took the sights and did the navigating.

2. Capt. Sommer held a Bays and Rivers master's license, and 46 U. S. Code 224a(3) says that "*any* license issued to a master * * * shall be deemed to be a certificate of competency for a master or skipper * * *"

3. Coast Guard regulations did not require a licensed master on this tug.

Even assuming a technical violation of the Convention and/or the statute, however, appellant's discussion overlooks many of the facts and misconceives the situation.

Appellant's argument on this issue blandly assumes that Capt. Sommer had no ability or experience merely because he did not hold some sort of offshore license. The

fact is, as we shall point out shortly, that Capt. Sommer had a great deal of experience with tugboats, and had previously made eight trips up the coast with tows in this same year.

Also, it is admitted that he did have a Master's license for bays and inland waters. Under Coast Guard regulations (46 C.F.R. 10.05-49), Capt. Sommer had thus passed a "satisfactory examination" as to his knowledge of:

"1. Inland Rules of the Road.
2. Distance off by bearings and run.
3. Speed by revolutions and by observation of landmarks.
4. Chart navigation and piloting.
5. Aids to navigation.
6. Winds, weather and current.
7. Signals: storm, wreck, distress and special.
8. Stability and ship construction.
9. Cargo stowage and handling.
10. Seamanship.
11. Temporary repairs to hull and equipment.
12. Drills and lifesaving apparatus.
13. Ship sanitation.
14. Ship's business.
15. General.
16. Practical chart work.
17. Such further examination of a non-mathematical character as the Officer in Charge, Marine Inspection, may consider necessary to establish the applicant's proficiency."

If Sommer needed another license, he did not need a full ocean or even a coastwise license, but only a license as Master of an uninspected vessel, since the *Sea Fox,* being enrolled and under 300 gross tons, was not "subject to inspection." Subpart 10.15 of Chap. I of 46 C.F.R. governs the licensing of officers on uninspected vessels. The subjects on which a Master of such a vessel is examined are listed in 46 C.F.R. 10.15-31.

The only differences between the requirements for the two types of licenses are that the Master of an uninspected vessel must know the elements of celestial navigation and of navigation at sea. In all other respects, the subjects covered by the two regulations are identical. Thus the only thing which can be said of Capt. Sommer's lack of an offshore license is that he had never passed an examination on celestial navigation. On such matters as distance off shore, speed, chart navigation, piloting, wind, weather and current, seamanship, and aids to navigation, he had passed an examination and received a license.

Any lack of ability in Capt. Sommer as to celestial navigation is utterly immaterial here for two reasons:

1. First Officer Reichel, who held an unlimited ocean license as Master, took the sights and did the navigation.

2. Nothing in the field of navigation had the slightest bearing on the events here concerned. The tug's officers at all times knew her approximate position, and at no time were tug and tow lost. Nor did any of the other vessels have any trouble finding the flotilla. When the

Sea Fox called for help and reported her position, the *Balsam* found her, with no effort, at the expected point.

In any event, what was needed in the skipper of the *Sea Fox* was not a theoretical knowledge of celestial navigation, or general ability as a merchant vessel officer, but skill and experience as a *tugboat* master. A holder of a Master's license for all oceans might be completely unsuitable to captain the *Sea Fox,* for lack of tugboat experience. Capt. Sommer had captained the tug for six years, and had towed eight other vessels up the coast in the six months preceding this voyage. There was no evidence offered to show that Capt. Sommer was incapable in any way.

The District Court, after seeing and hearing Capt. Sommer and the other witnesses on the stand, rendered an opinion in which it discussed the burden of proof allegedly resting on the tug-owner. After first holding that the rule did not apply here, the Court said:

> "Assuming, however, that in this case the rule is applicable, the burden of proof *has been carried,* because the evidence clearly shows that the *Herald* was set adrift and carried into a position of danger *solely by violence of the storm.*" (Apostles, 51.)

Paragraph XI of the Findings (Apostles, 64-66), on the uncontradicted evidence, recites that:

1. Capt. Sommer had been Master of the tug *Sea Fox* for six years.

2. He had previously, in the same year, towed eight vessels up the coast from San Francisco, two of them

being of the exact size of the *Herald,* and one of those two having gone to Everett.

3. The tug's Chief Officer, Reichel, was an experienced tug man with an unlimited ocean Master's license, and Second Officer Harris held an unlimited ocean chief officer's license.

4. Sommer and Reichel conferred frequently on operation and navigation, and Reichel took the sights and did the navigation.

5. "Captain Sommer and Reichel were experienced tugboat men and each of them impressed the court as able, competent, courageous and truthful mariners."

6. Sommer's lack of an unlimited license did not and *could not* have contributed to the plight of the *Herald.*

Appellant's argument on this point really boils down to an attack on a few specified acts of the tug, such as her alleged fault in "proceeding without an insurance wire." Those acts must be judged on their merits, uninfluenced by Sommer's lack of an ocean license. If the tug did something wrong, it was at fault even if Sommer had had a license. If it did nothing wrong, it is free from fault although Sommer had no license. In other words, the *conduct of the tug* is to be judged, and is the *sole* criterion.

The difficulty with appellant's approach is that it tries to invoke the *Pennsylvania* rule in a situation where it does not logically apply, thus extending the rule far beyond the bounds of anything required or permitted by

the rationale of *The Denali,* 112 F. (2d) 952, or of any other decision in the books.

In *The Denali,* and in all the cases cited therein, the vessel took action in violation of law, and the violation was a direct and operative factor in the disaster. There was a present relationship or tie-up between the breach of regulation and the casualty, and it was logical to require the offender to disprove any relationship of proximate cause between breach and accident.

Thus, in *The Denali,* the vessel hit a *known and charted reef* while being operated by an officer who was fatigued by standing longer watches than permitted by law. There was a direct, operative connection between breach and accident, and it was entirely logical to apply the *Pennsylvania* rule. Note, however, that *negligent navigation admittedly existed,* and the question at issue was whether it took place without the owner's privity and knowledge when the owner knew of the unlawful watch bill on the ship, and so knew that the officers would be excessively fatigued at times.

Had there been no negligent navigation in *The Denali,* but a loss by heavy weather, the violation of the watch regulations would have been immaterial. So here, *if* Capt. Sommers did something wrong as a matter of good seamanship practice, his lack of an ocean license might be relevant. If he did nothing wrong, then his holding or not holding a license is of no relevance or importance. Hence, before the *Pennsylvania* rule could possibly be called into play, appellant must establish some negligence in the conduct of the tug as an operative factor.

Other cases cited in *The Denali* likewise involve collision or stranding or cargo damage occurring while the ship's breach of law or regulation was actively creating a risk of damage and so was an operative factor. The limits of *The Denali* rule are set forth in italics in the printed opinion at p. 955 of vol. 112 F. (2d) thus:

> "The rule and presumption * * * control * * * where the vessel has violated the positive command of a safety statute to prevent fatigue in the navigating officer controlling her navigation *at the time that navigation caused the injury.*"

In other words, the *Pennsylvania* rule will apply to Capt. Sommers' lack of an ocean license only if and when it is first established that something wrongly done or omitted by him contributed to the *Herald's* predicament. But in judging whether the tug acted properly or improperly, the burden of proof rests on appellant, and the usual standard of due care and good seamanship must be applied without regard to the license question. It is *not* the law that the same action which would be proper if ordered by a licensed officer somehow becomes improper if ordered by an unlicensed man. The standard is impartial and objective: What would a good seaman have done?

Appellant cites, in support of its argument, *The City of Baltimore*, 282 Fed. 490 (4th Cir.). The opinion in that case shows that the acts of the unlicensed master were, in themselves, negligent. At page 493 of the opinion, the Court points out that the tug there should not have assented to a port overtaking, should have blown a danger signal, and should have heard the earlier signals of the

other ship. The Court therefore held that the conduct of the unlicensed officer "entered into the occurrence"—i.e., *that his actions were negligent.*

The City of Baltimore, then, is not in point here unless and until it is established that Captain Sommers did something he should not have done, or omitted to do something which he should have done. It is not authority for condemning what would otherwise be prudent acts, merely because they were done by an unlicensed man. The issue always is this: did the tug act prudently or negligently?

On that basic issue, appellant attempts to argue that the *Sea Fox* was at fault in these particulars (Appellant's Opening Brief, p. 22):

1. She proceeded from Drake's Bay without having on board an extra towing wire of full length.

2. She delayed calling the Coast Guard for assistance.

3. Her towing engine became disabled.

4. She failed to seek a refuge after receiving storm warnings.

5. Sommers "allowed" the tow line to break on November 7, "allowed" another wire to become fouled on November 7, and left Drake's Bay without checking the towing engine or repairing the traveler.

Incidentally, the very making of these charges is an admission by appellant that the issue as to Capt. Sommers' competency is to be judged by what he *did,* rather than by the limited extent of his license. Let us now briefly discuss each of the particulars in which Capt. Sommers and the tug are accused of negligence.

1. **The "insurance wire" issue.**

The *Sea Fox* started from San Francisco with two full wires and a third 600-foot wire. (Reichel, Apostles, 106-7.) The two full wires broke and/or became jammed so that they had to be discarded, and at Drake's Bay the *Sea Fox* obtained a brand new wire from a sister tug. When the flotilla left Drake's Bay, this full *new* wire, in good condition, was attached from tug to *Herald,* and an emergency wire of 600 feet was aboard the tug. (Reichel, Apostles, 109 and 159-60.)

Reichel testified (Apostles, 160) that the 600-foot spare was satisfactory as a spare, and *nobody testified to the contrary.* More importantly, however, the record shows beyond all doubt that the presence of a dozen new 1200-foot wires on the *Sea Fox* would have been of no value whatever in avoiding or lessening the *Herald's* difficulties.

Even *before* the tug's wire to the *Herald* parted, the *Neptune* was on the scene and tried to get a line to the *Herald.* The weather was so severe that she was not able to do so. (Finding V, Apostles, 59; Sprague, Apostles, 197-8; Schmitz, Suppl. Apostles, p. 414.) The *Sea Fox's* wire parted during the night of November 15-16, and in daylight hours the next day, the *Neptune* again tried to get a line to the *Herald,* but was prevented by the weather from doing so. Although she managed to get a heaving line over to the *Herald,* the latter's crew were unable to pull in the towing hawser to make it fast. (Finding V, p. 60 of Apostles; Sprague, pp. 201-4 of Apostles; Sweeting, pp. 330-31 of Apostles.) Subsequently, while still trying to get a line across, the *Neptune* struck the *Herald* and was badly damaged. Once the *Neptune* had been

holed, the *Sea Fox* stood by until she sank, on orders from the Coast Guard. (Finding V, p. 60 of Apostles; Reichel, pp. 130-31 of Apostles; Sommers, pp. 236-7 of Apostles; Schmitz, p. 416 of Suppl. Apostles.)

The *Sea Fox* was thus prevented from trying to pass a line to the *Herald* until she got back to the scene at 5:10 P.M. of the 16th. (Schmitz, p. 418 of Suppl. Apostles.) After ordering the *Herald* to drop her anchor, the *Sea Fox* tried to get a line to the tow with a Lyle gun, but was unsuccessful because of wind and darkness. (Reichel, pp. 133-4 and 177-8 of Apostles.) The next day, November 17, the Coast Guard vessel *Winona* got a 12-inch manila line to the *Herald* and gave the other end to the *Sea Fox*. From then on there was always a line to the *Herald* and her danger was lessened.

In other words, for many hours before and after the breaking of the tow line at 0040 on November 16, the weather was so severe that *no* vessel could get a line aboard the *Herald,* and the *Neptune,* which tried to do so, was sunk in the attempt. During this period it would have been of no avail for the *Sea Fox* to have had one or a dozen spare lines aboard. And, quite obviously, neither the presence of a spare wire nor an ocean license held by Capt. Sommers would or could have prevented the wire from breaking when it did.

As soon as the weather permitted, a line *was* passed to the *Herald.* That this was done by the *Winona* may have operated to reduce the *Sea Fox's* share of the total salvage award, but does not establish any causal relation between the plight of the *Herald* and the alleged inadequacy of the spare wire on the *Sea Fox.*

Appellant's argument on this issue is highly specious, even if we assume that, as a matter of good seamanship, a full length spare wire should have been on the tug when the trip was resumed from Drake's Bay. We are not dealing with a case where the tow was lost or damaged because a tow line parted and no other line was available in time to prevent loss. We have a case where salvage services became necessary *because the tow line broke.* Certainly the presence of six extra wires on the *Sea Fox* could not have *prevented* the breaking of the tow line in use. And once that line parted, the *Herald* was in trouble and needed help. Help was given *just as soon as the weather permitted,* and the *Herald* was saved.

We submit that the "insurance wire" question is completely irrelevant to any issue in this case.

2. The SEA FOX called for help in ample time.

Appellant complains, at page 22 of its brief, that Sommers failed to call for help as soon as he heard storm warnings. Appellant does not even attempt to point out what, if anything, this "delay" had to do with the subsequent events. The truth is that any delay in this respect had absolutely no causative effect on the events of November 16-17.

The forecasts of November 13 quoted on pp. 19-20 and iii of Appendix A in appellant's brief predicted winds of 25-35 m.p.h. off the Oregon Coast for the next day. In fact, the weather was more severe than that, and in the afternoon of November 14, *Sea Fox* called for help. The *Balsam* got the message at 3:50 P. M., left Astoria at 5:15 P.M., and arrived on the scene at 8:30 that same day, and

the weather *moderated* on the 15th. In the evening of the 15th, the *Neptune* arrived, and from then on the weather rapidly grew worse. The hawser from *Sea Fox* parted at 0040 on November 16 (40 minutes after midnight).

How a failure to call for help sooner could possibly have caused *Herald's* predicament is difficult to see. Two other vessels were standing by *long before the tow line broke,* and what could then humanly be done *was* done, with complete success.

3. The disablement of the SEA FOX'S towing engine was not due to fault of any kind.

As required by the towage contract, Everett-Pacific (not libelant) prepared the *Herald* for towage, and both tug and tow were examined by a surveyor for underwriters before they left San Francisco. The survey report (Apostles, 285-288) recites that the surveyor made his examination in the presence of representatives of Everett-Pacific and Sudden & Christenson, and concludes as follows:

> "The towing tug is the *Sea Fox* * * * which previously towed the *SS. Young America* from Oakland, Cal., to Everett, Wash. In the opinion of the undersigned, *both tug and tow are fit to proceed* * * *"

This survey is the only evidence offered by appellant, and it confirms the tug's seaworthiness at the start of the voyage. It is corroborated by Capt. Reichel (Apostles, 107), and *there is no evidence to the contrary from anyone.*

The difficulties experienced with the towing engine on November 14 are explained by two very obvious circumstances which appellant's brief fails to mention. The weather became very rough, and the *Herald*, being light, presented a large target to the wind and so was very unwieldy. Although it started the trip with its rudder fixed in an amidships position, the high wind and seas caused it to yaw violently, thereby increasing still further the strain produced by the severe weather. (Reichel, 116, 126, 150; Sprague, 214.)

As the trial judge stated in his opinion (Apostles 40-41),

> "During the night of the 13th and on the 14th the tug and tow encountered increasingly heavy weather; the towing board that had been placed on the tug's stern to keep the tow wire from chafing went overboard; the towing engine's gears carried away * * *"

Chief Officer Reichel of the *Sea Fox* testified (Apostles, 111):

> "Oh, the 14th was the day that it began blowing very hard and we lost our towing board over the side * * * And we were encountering tremendous seas and a very heavy blow, and had to throttle down to just bare steerage way. * * *"

The log of the *Sea Fox* (Respondent's Exh. A, not printed) records for the period 8 to 12 P.M. on November 13, "strong SE wind, big sea and swell, tug and ship pitching bad", and for the 14th, at 7 A.M., in connection with the breaking of the gear teeth on the towing engine,

says, "Wind moderate to fresh SEly gale, heavy seas and large swells. Vessel and tug both rolling heavily."

The log of the Coast Guard cutter *Balsam* (exh. to Schmitz deposition; exh. not printed) for November 14, while she was lying in the relatively sheltered port of Astoria in the morning, shows wind force as SE 6 at 4 A.M. and SE 8 ("fresh gale") at 8 A.M.

In view of this severe weather and the extra strains imposed by the awkward behavior of the *Herald* in her light condition, the District Court very properly found that the breakdown of the tug's towing engine was due to stress of wind and wave.

Incidentally, we note appellant's comment that the *Sea Fox* log for 8 to 12 P.M. of the 13th has an entry which originally read, "towing out of commission", and was changed to read, "towing engine broke". The two entries mean the same thing and there has been no change of substance. We note from the record that the log was furnished to appellant's counsel in Court, and that he made no effort to examine Capt. Sommer or Capt. Reichel on this point.

Whether something else happened to the towing engine late on the 13th, and the gear stripped on the 14th, or whether the gear stripped late on the 13th and the 7 A.M. entry on the 14th is merely an elaboration of the details, we do not know. In either event, heavy weather prevailed at both times, and the trial Court found that to be the sole cause of the breakdown. Appellant has not shown that this finding, based on the testimony given in open Court,

is "clearly erroneous," and has not pointed to any *evidence* at all which would conflict with that finding.

a. **The Fairlead Traveler.**

Appellant argues earnestly that the *Sea Fox* was at fault in leaving Drake's Bay on the 8th without a fairlead traveler, which, appellant says, left the *Sea Fox* "with only half an effective towing engine." This argument is highly specious; it overlooks the function of the traveler and the facts as to what happened thereafter.

The fairlead traveler is a device which spreads the wire back and forth evenly over the drum of the towing engine when a towing wire is being coiled onto the drum. It thus prevents the wire from bunching on one part of the drum, and helps to prevent snarls or kinks. It has no function when wire is let *out* from the drum, and is not needed if only a turn or two is taken in.

As Reichel testified (Apostles, 167), the towing engine of the *Sea Fox* did not automatically take in or pay out line as the strain varied, but it was the practice to *pay out* a few feet occasionally, in order to avoid chafing the same spot on the wire. The traveler has nothing to do with letting out line, hence was not needed at any time after the flotilla left Drake's Bay.

When the gear teeth stripped on the 14th, the entire strain of holding the drum fell on the hand brake, and the hand brake could not do the job alone. This can be understood by comparing the action of the drum and winch of the towing engine to an automobile engine. When a car is parked on a grade, the driver not only sets the

hand brake, but leaves the gears engaged in low or reverse, so that the wheels are connected to the engine through the gears, and the engine acts as a brake to prevent movement of the wheels.

So, on the *Sea Fox,* the drum on which the tow line is coiled is connected to the winch by gears whose teeth intermesh, and the winch helps to prevent the drum turning and paying out all the line. When the gear teeth stripped under the strain of the yawing *Herald* in severe weather, the drum was held stationary only by the hand brake, which could not do the job alone. The drum began to slip, and there was danger that the *Sea Fox* would lose hold of her end of the towing wire. To hold the drum still, it was necessary to wedge a piece of steel between the drum and the fixed part of the winch. (Reichel, 112-113; 169-170.)

Once the drum was so wedged, it could not turn either way. Without the gear teeth to connect the drum and winch, the winch could not turn the drum at all, and no wire could be taken in. Hence the absence of the fairlead traveler had nothing to do with the situation in any way, and *a traveler would have been of no possible use or help.*

Thus the *facts* show that the failure to repair the traveler at Drake's Bay had no possible relationship to subsequent events. During the period from November 8 to 14, there was no occasion ever to use the traveler and the trip proceeded normally and safely. After the gear teeth of the drum stripped, so that it had to be jammed in one position, the traveler *could* not have been used for any purpose.

4. There was no refuge which the tug could seek.

Appellant, in its effort to avoid a just liability for salvage services received, criticizes the *Sea Fox* and Capt. Sommer for failing to seek a port of refuge when storm warnings were received on November 13, or when the teeth on the towing drum carried away on the 14th. Appellant notably omits to specify just *where* such a "refuge" could have been found. In fact, there was *no* available refuge, and appellant's argument is like suggesting that the shipwrecked sailor marooned on a desert isle should consult a doctor for his headaches.

On the 14th of November the tug and tow were southwest of the mouth of the Columbia River (Sommer, 240; Reichel, 166), and the only port available would have been Astoria, inside the Columbia River Bar. The forecast received on the 13th (Apostles, 342) ordered southeast storm warnings displayed "Washington Coast and *mouth of Columbia,*" and the second forecast of November 15 (Apostles, 343) again ordered storm warnings from Tatoosh Island to Cape Blanco. The actual weather experienced on the 14th, and from darkness on, on the 15th and 16th, was gales and heavy seas.

In the face of such storm warnings for the Columbia bar and the conditions actually prevailing at sea off the mouth of the river, it would have been foolhardy for a tug with such a difficult tow to attempt crossing the bar, which is admittedly a dangerous place in rough weather. Four experienced tug masters testified unanimously that it would have been risky and very bad seamanship for

the *Sea Fox* to have tried to take the *Herald* across the bar.

Capt. Flagstad, master of the tug *Hercules,* with 35 years' experience, said it would have been bad judgment to try the bar. (Apostles, 259-60.) Capt. Sprague of the tug *Neptune,* with 15 years' experience, testified the bar would have been impassable for such a tow, which is a harder proposition than taking in a ship under her own power. (Apostles, p. 215.) Capt. Reichel, first mate on the *Sea Fox,* testified it would have been imprudent to try the bar on the 13th, 14th, 15th or 16th, and probably impossible to make it. (Apostles, 151.) Capt. Sommer of the *Sea Fox* expressed the same judgment. (Apostles, 239-40.)

The only witness who ventured an opinion to the contrary was Capt. Sweeting of the *Herald,* who glibly explained that crossing the Columbia River bar would have been "most simple," because the wind was from the *northwest,* "practically no wind to speak of," and the bar is protected from a northwest wind. (Apostles, 325.) When he looked at his log and read the weather entries for the 14th, however (Apostles, 325), he recited his observations, made and recorded on the spot, that the wind was from the *south, southeast* and *southwest,* varying from force six to eight (from 27 to 40 *nautical* miles per hour, or about 30 to 45 land miles per hour). Force 8 is a "fresh gale".

Capt. Sweeting's recollection on the stand was generally unreliable. He also testified that the weather was just "ordinary" *early* on the 16th, when the tow line

parted (Apostles, 326), and supported that by reading his log entry of southwest winds, force 6, at *4 P.M.* Then, still under examination by his own counsel, he found an entry of *southerly gales* in his log for November 16, and finally established that entry as relating to 8 *A.M.*, but only after much confusion and some help from his examiner. Even the cold record shows the man's unreliability:

"Q. (By Mr. Morse). Captain, look on the other sheet. I think you will find an entry at 8 a.m.

A. Well, I don't see it. Oh, yes, vessel drifting in southerly gale. No power, helpless. Tug *Sea Fox*—yes. Southerly gale, yes.

Mr. McKeon. What hour is that, Captain?

The Witness. That is 8 a.m. No. Yes. No, no, that is 8 at night. That is 8 at night.

Q. (By Mr. Morse). Isn't that 0800, Captain?

A. Sir?

Q. Isn't that 0800?

A. Yes, 0800. That's right, 0800. That's right, that's 8 a.m." (Apostles, 327.)

On cross-examination, Sweeting said his last previous command had been a Navy tanker, but then admitted that the tanker, like the *Herald,* had been a dead ship towed up the coast, and that he had *never* commanded a ship under power at sea, but "my license was used on three trips over the Columbia River Bar," whatever that means. (Apostles, 335-6.) He did not say that his license was so used in a gale, or that those trips involved a tug with an unwieldy tow.

It is noteworthy in this connection that the master of the Coast Guard vessel, *Balsam,* which was on the scene

as early as 8 P.M. on the 14th, never suggested to the *Sea Fox* that she head for the Columbia, and his official report No. 13-49, after stating that during November 15 he kept on the starboard quarter of the *Herald,* says this:

> "During this period courses were steered by the *Sea Fox that were best suited to the existing conditions.*" (Exh. B to deposition of Lt. Schmitz. Exhibit not printed, but sent up in original form.)

On that state of the entire record, the trial judge properly rejected the fantastic contention of Capt. Sweeting, and accepted the judgment of four experienced tug men and the Coast Guard that the failure to try for the Columbia River bar was not a fault of any kind. We submit the finding cannot be attacked here.

5. The events at Drake's Bay are irrelevant.

Appellant's last charge is that Capt. Sommer was negligent, and that his lack of an ocean-going license somehow becomes material, because he "allowed" a tow wire to break and "allowed" a wire to become tangled on November 7, and then left Drake's Bay without "checking" the towing engine and without repairing the fairlead traveler.

We have already demonstrated that the absence of the fairlead traveler from Drake's Bay onward did not and could not have had anything to do with the events of November 14 and 16. The same thing is true of the loss of two lines on November 7. No damage was then caused to the *Herald,* and no salvage is claimed for the reorganization at Drake's Bay. Those matters are and were so

irrelevant that, very properly, neither party wasted any time on them at the trial.

Appellant's phraseology is hopefully but unhappily chosen. Its statement is that non-ocean-licensed Sommer "allowed" a line to break on November 7. The implication is that this would not have happened if Sommer had held an ocean license, but nothing is said as to just how these two factors represent cause and effect. Throughout its brief, appellant suffers from a sort of King Canute complex in assuming that an ocean license could still the waves and govern the behavior of inanimate towing wires.

It is a fact that on November 7 the tow wire broke in rough weather, and that a second wire became so tangled that it had to be thrown away. A sister-ship of the *Sea Fox* then supplied a full-length *new* wire (Reichel, 159), and its subsequent parting in the gale of the 16th is understandable. The most appellant can argue from the loss of two wires on the 7th, is that, thereafter, the *Sea Fox* had only a 600-foot spare wire aboard, rather than a full 1200-foot one. We have already pointed out, above, that the presence of a full length spare wire could not have prevented the breaking of the line in use on November 16, and that the absence of such a wire did not and could not have had any causal relationship to the events giving rise to salvage services.

As to the failure to repair the fairlead traveler, we have shown above that the traveler was never needed after the 8th, would not have been used between the 8th and 14th had it been operative, and could not have been used after the gear teeth stripped on the 14th.

The last part of appellant's charge is that Capt. Sommer did not "check" the towing engine before leaving Drake's Bay. Just what kind of check should have been made is not suggested, and it is obvious that time and place did not permit tearing down the engine to examine the gears and to have them X-rayed or magnafluxed. Nor had anything happened to strain the engine or to lead anyone to believe that a detailed inspection was needed.

All that had occurred was that a tow-line had parted, as happens occasionally. Appellant offered no expert or other testimony that a detailed inspection and test of the towing engine should then have been made, and it is obvious that nothing less than that would have been of any value. In fact, the towing engine worked satisfactorily for the next six days, some of which were stormy, and broke down early on the 14th because of the extraordinary strains created by very severe weather and the awkward behavior of the high, unwieldy *Herald*.

III.

LIBELANT'S RIGHT TO SALVAGE IS NOT BARRED BY NEGLIGENCE OR BY THE TOWAGE CONTRACT.

Appellant's third specification contains two parts. The first cites cases for the rule that a tug cannot recover salvage when its fault contributes to the peril from which the tow is saved, and refers to the previous charges of negligence against the tug. We have already shown the correctness of the finding that the tug was operated with due care and good seamanship, and that none of the

"faults" argued by appellant was or could have been a contributing factor to the peril from which the *Herald* was saved.

As to the legal effect of the towage contract, appellant stresses what it calls the foreseeability of storms off the Pacific Coast, then argues that a tug can claim salvage only if the situation becomes so hopeless that she would be legally justified in abandoning her tow. Let us take up these contentions one at a time.

The fact that storms are foreseeable along the coast in November is entirely immaterial and irrelevant. There was no storm brewing or predicted when the tug left San Francisco on November 5, nor when the voyage was resumed from Drake's Bay on the 8th. Appellant makes no charge that the tug was negligent in proceeding on either of those dates. By the time the first warning was received (the 13th), the flotilla was so far up the coast that, as we have shown, no port of refuge was then available.

Hence, we have here no issue of the tug being negligent in starting or proceeding in the face of storm warnings. We do not understand that appellant is trying to argue that it was negligent, per se, to try such a voyage in November. If so, the answer is that appellant and Everett-Pacific wanted the ship moved as soon as possible, and that they *and their underwriters* recognized the possibility of storms and voluntarily took a chance on that.

Appellant also cites cargo damage cases holding that foreseeable rough weather is not a "peril of the sea" which will relieve the carrier from liability. The phrase is virtually a word of art in cargo cases, and the rule in

that type of case is based on the sound reasoning that diligence must be exercised to make a cargo vessel fit to carry her freight safely through the kind of weather that can reasonably be expected. It is a rule applied to *common carriers* and has no application here. A tug is not a common carrier or bailee, and *it is far more difficult for a tug and a dead ship to weather a storm than it is for a powered vessel to carry her cargo safely.*

The crux of appellant's argument on this point as to the effect of the towage contract, however, is its contention that the *Sea Fox* cannot claim salvage unless the circumstances were such that she would have been legally justified in abandoning the *Herald* to its fate after the tow line parted on November 16. In support of its argument, appellant cites cases holding a tug liable for loss or damage to the tow when the tug failed to stand by the tow and do what she could to save it. These cases are: *The Barryton,* 42 F. (2d) 561; *The Seminole,* 279 Fed. 94; *In re Moran,* 120 Fed. 556; *Appeal of Cahill,* 124 Fed. 63; *Alaska Commercial Co. v. Williams,* 128 Fed. 362; *Atkinson v. Scully,* 246 Fed. 463.

We are not dealing with a suit for loss of the *Herald* because of her abandonment by the tug, hence none of the foregoing decisions is in point here. They hold only that a tug is liable for *loss* of the tow if the tug fails to act reasonably to save the tow. They do *not* hold that the tug cannot recover a salvage award if it does stand by and render salvage services. These decisions in suits against the tug are expressly distinguished on that ground in the salvage case of *The City of Portland,* 298 Fed. 27,

30 (5th Cir.), which will be discussed at greater length hereinafter.

The true rule as to when a towing tug's services change from a contractual to a salvage basis is laid down in the leading and oft-cited case of *The Minnehaha,* Lush. 335, 15 Engl. Reprint 444. In that case (decided by the highest English Court—the Privy Council), a sailing vessel, anchored 7 miles offshore, hired the tug *United Kingdom* to tow her into port for a fixed sum, and the tug began to do so. The tow line broke and the ship drifted into a position of danger. Another tug, the *Storm King* (owned by the owner of the *United Kingdom*) came to help, and both tugs pulled in tandem on the ship to hold it against the tide until a third tug arrived, whereupon the three tugs towed her to port.

The lower Courts denied a salvage award to the *United Kingdom* and *Storm King* on the ground that the *United Kingdom* had only done what her contract required, and that her owner could not claim salvage for services of that tug or of the *Storm King,* also owned by him. This was reversed on appeal, and a salvage award was made to the contract tug. The opinion is such a clear and sound exposition that we take the liberty of quoting it rather extensively, as follows:

> "When a steam-boat engages to tow a vessel for a certain remuneration from one point to another, she does not warrant that she will be able to do so and will do so under all circumstances and at all hazards; but she does engage that she will use her best endeavors for that purpose, and will bring to the task competent skill, and such a crew, tackle, and equip-

ment as are reasonably to be expected in a vessel of her class.

"She may be prevented from fulfilling her contract by *vis major,* by accidents which were not contemplated and which may render the fulfillment of her contract impossible; and in such case, by the general rule of law, she is relieved from her obligations.

"But she does not become relieved from her obligations because unforeseen difficulties occur in the completion of her task; because the performance of the task is interrupted, or cannot be completed in the mode in which it was originally intended, as by the breaking of the ship's hawser. *But if, in the discharge of this task, by sudden violence of wind or waves, or other accidents, the ship in tow is placed in danger, and the towing-vessel incurs risks and performs duties which were not within the scope of her original engagement, she is entitled to additional remuneration for additional services if the ship be saved, and may claim as a salvor, instead of being restricted to the sum stipulated to be paid for mere towage.* * * *

"* * * In the cases on this subject, the towage contract is generally spoken of as *superseded by the right to salvage.*

"It is not disputed that these are the rules which are acted upon in the Court of Admiralty, and they appear to their Lordships to be founded in reason and in public policy, and to be not inconsistent with legal principles.

"The tug is relieved from the performance of her contract by the impossibility of performing it, but if the performance of it be possible, but in the course of it the ship in her charge is exposed, by unavoidable accident, to dangers which require from the tug serv-

ices of a different class and bearing a higher rate of payment, it is held to be implied in the contract that she shall be paid at such higher rate.

"To hold, on the one hand, that a tug, having contracted to tow, is bound, whatever happens after the contract, though not in the contemplation of the parties, and at all hazards to herself, to take the ship to her destination; or, on the other, that the moment the performance of the contract is interrupted, or its completion in the mode originally intended becomes impossible, the tug is relieved from all further duty, and at liberty to abandon the ship in her charge to her fate;—would be alike inconsistent with the public interests.

"The rule as it is established guards against both inconveniences, and provides at the same time for the safety of the ship and the just remuneration of the tug. The rule has been long settled; parties enter into towage contracts on the faith of it; and we should be extremely sorry that any doubt should be supposed to exist upon it."

In other words, it is *not* the law that a tug can claim salvage against her tow only if she would have been justified in abandoning it. The true rule is that the tug must not abandon until the situation is hopeless, but that she can claim salvage if, because of the peril, she renders extraordinary services which, if performed by someone else, would constitute salvage.

In *The Albion*, Lush. 282, 167 Engl. Reprint 121, a tug and tow had to anchor and the tug had to run to port for safety. After the storm subsided, the tug went back to sea, found the ship, and towed her back to port in

moderate weather. The judge allowed a salvage award to the tug both for seeking her tow and for towing her in, saying that he gave the tug "great credit." We suggest appellant might give the *Sea Fox* a little credit here, instead of embarking upon a rather ungrateful criticism of everything the tug did.

That our law coincides with English law is demonstrated by the decision of this Honorable Court in *Kovell v. Portland T. & B. Co.,* 171 F. (2d) 749, in which *The Minnehaha* (supra) was cited and quoted in allowing a salvage award to members of the tug's crew for services performed *while the tug was standing by the tow as required by law.*

In *The City of Portland,* 298 Fed. 27 (5th Cir.), tugs were towing a ship up the Mississippi River when the ship sprang a leak. The tugs then towed the ship to a shallow flat, beached her, and pumped her out after the leak had been closed. The tugs were never in danger, the weather was not rough, the tow lines did not even break, and the shipowner argued that the tugs were not free to abandon the ship, and therefore could not claim salvage. The Court distinguished, as not in point, cases holding the tug liable for wrongfully abandoning the tow, and held that towage becomes salvage when the tow is in danger, *even though the tug would not be justified in leaving. The Minnehaha* is again cited and applied as being sound law.

The case cited by appellant of *The I. C. Potter,* L.R. 3 Adm. & Eccl. Cas. 272, used language which, viewed out of context, seems to indicate that a tug cannot claim salvage from her tow unless the circumstances were such that she would have been justified in abandoning the tow.

However, the facts in that case were that tug and tow encountered heavy weather, and the tug simply kept on towing. The tow line did not part, the tow was never in danger, and only slight risk to the tug was involved. The case is decided by a Court inferior to the Court which decided *The Minnehaha,* and is not authority for denying salvage where, as here, the tow line parts, the tow is in danger, and the tug renders extraordinary services at real peril to herself. In fact, after using the language quoted by appellant, the Court in *The I. C. Potter* went on to *allow* a salvage award to the tug.

It could be argued with reason that the *Sea Fox* would have been justified in leaving the *Herald* on the 16th, since the tug's towing engine was broken and the *Balsam* and *Neptune* were on hand to render aid. We need not thus raise an extra and unnecessary issue, however, because, at the very least, the circumstances after the tow line parted were such that the *Sea Fox's* subsequent services were of a salvage nature and deserve a salvage award under the decisions cited above.

Appellant cites a group of cases where a tug was awarded salvage against its own tow, and purports to find, as a distinguishing feature, that in each of those cases there was a failure of the tow's equipment, or the tug's watertight integrity was breached. There was no such element in the *Kovell* case (supra), and in none of the cited cases was the decision based on such an artificial and narrow ground. The true *ratio decidendi* of those cases is this:

Where, for any reason other than the fault of the tug, the tow is in danger, and something over and above ordi-

nary towage is needed, the tug may not abandon, but must do what she can to help. *If she does so, she is entitled to a salvage award.*

At page 28, appellant's opening brief cites *The Marechal Suchet,* XI Asp. (N.S.) 553, where a tug which helped get its tow off a strand was denied salvage. Appellant then quotes two isolated fragments of the opinion to give the impression that salvage was denied because the tug only performed its contractual duty. An intelligent reading of the entire opinion will disclose that the tow stranded while the tow line was intact, and the Court held that this created a presumption of inadequate power or poor handling which the evidence did not overcome. Salvage was therefore denied because the tow's peril had been brought about by the tug's negligence, and that is all the case holds. In fact, it is cited for that rule at page 23 of appellant's opening brief.

IV.

THE AWARD TO THE SEA FOX IS NOT EXCESSIVE.

At pages 32-39, appellant's opening brief argues that the award to the *Sea Fox* is too high, in that the share allotted to the non-government vessels was too high, and the District Court should have made some reduction in the *Sea Fox's* share because of her obligation to her tow. Appellant's discussion assumes that the District Court failed to consider the tug's obligation, when there is no such showing in the record, and is self-contradictory on its face.

To begin with, appellant concedes that the District Court followed the proper rule in first determining the aggregate value of all services rendered by all five vessels, and then apportioning it among them. Appellant then grudgingly concedes that a total award or valuation of $60,000 was fair and proper. Next, appellant concedes that the distribution as between *Sea Fox* on one hand and the owner of *Hercules* and *Neptune* on the other, was proper.

As between these latter three, the District Court awarded $24,750 to this appellee and $20,250 to Puget Sound Tug & Barge Co., owner of the *Hercules* and the *Neptune,* and their crews. Remember that the *Neptune* was totally lost in her valiant attempt to help, and that *Hercules* helped to tow from off the Columbia River to Everett, through some more heavy weather. When appellant concedes that *Sea Fox* should get 55% as against 45% for *Neptune* and *Hercules* combined, appellant admits that the services of the *Sea Fox* were of a very real value.

Also, the concession of $60,000 as a proper over-all figure is an admission that, as the record shows, the *Herald* was in serious danger and was saved only by extraordinary exertions of the vessels involved. If $60,000 is a proper award for all five vessels, it is a proper award for the services of the *Sea Fox* and the other four, and any "allowance" for the *Sea Fox's* contractual obligation has already been made. The whole is equal to the sum of its parts. We know of no place in the opinion below, or in the Findings and Conclusions, where the District Court held or intimated that it had failed or refused to take into consideration the contract obligation of the *Sea Fox.*

Nor does the attack on the division of the $60,000 as between government and private vessels come with convincing force from an appellant who has already paid Puget Sound Tug & Barge Co. the full amount awarded to it below. If appellant is sincere in its contention, it would and should have appealed in the companion case. In effect, appellant claims that all the non-government vessels, together, should get only $30,000. Since appellant admits that the non-governmental award should go 45% to Puget Sound and 55% to *Sea Fox,* appellant is arguing that *Sea Fox* should get only $16,500 and Puget Sound only $13,500. Yet appellant has paid the full award of $20,250 to Puget Sound as owner of the other two vessels.

Still more colorable and misleading is appellant's comparison (pp. 34-39) of the values and services of the salving vessels. Its discussion entirely omits the vital elements of the *work done* by each vessel and *the risk taken* by each vessel. Also, appellant gratuitously drags in the *Prairie,* giving it an assumed value out of thin air. The *Prairie* is a naval vessel which came along on the 16th, stood by for a few hours, then resumed its course. *It rendered no services of any kind whatever.* To assume a value of $950,000 for that ship and to add it to the values of the *Winona* and *Balsam* to get a figure of $2,100,000 for government vessels is a rather questionable tactic, to say the least.

We cheerfully concede that *Winona* and *Balsam* were worth $1,150,000 as against $400,000 for the three tugs. Values, however, are of little moment in deciding how a conceded "award" of $60,000 is to be divided among

the salving vessels. As among them, the crucial elements are these:

1. What did each one *do?*
2. How much *risk* did each incur?
3. What, if any, *damage* did each incur?
4. How effective and *material* were each vessel's services?

At pages 36 to 39, appellant's opening brief sets forth a chronological history, in two columns, contrasting the efforts of the *Sea Fox* with those of the *Balsam* and *Winona.* Appellant manages to use a lot more words to describe the actions of the government vessels than for the *Sea Fox,* so that the columnar tabulation *looks* as if the Coast Guard did more than the tug. The *facts,* however, are weighted the other way.

More importantly, however, a contrast between the *Sea Fox* and the two Coast Guard vessels is meaningless. The comparison to be made is between *all three* private tugs on the one hand, and the two government vessels on the other hand. This is true for these reasons:

1. Judge Roche found the services of all five vessels to be worth $60,000. Appellant did not attack this finding by a specification of error, and has *conceded,* in its opening brief, that *this over-all figure is reasonable.*

2. Judge Roche then allocated one-fourth of this figure, or $15,000, to the services of the Coast Guard vessels, and the remaining $45,000 to the three privately owned tugs, *Sea Fox, Neptune* and *Hercules* (the latter two being owned by the same firm, Puget Sound Tug and Barge Co.).

3. The amount awarded for the three tugs was subdivided 55% to *Sea Fox* and 45% to the owner of the other two tugs. Appellant filed no specification of error attacking *this* allocation and *concedes that it was proper.*

Since $60,000 for the five vessels is concededly fair, and since it is conceded that the libelant should receive 55% of that portion of the $60,000 which is allotted to the non-governmental vessels, appellant's attack is limited by its assignments of error to the allocation of the $60,000 between governmental vessels and non-governmental vessels as two *groups.* In algebraic language, appellant has conceded that x (private vessels) plus y (government vessels) equals $60,000, and that libelant is entitled to receive 55% of the x figure. In determining the values of x and y, then, appellant cannot compare 55% of x to all of y, but must compare *all* of x (i.e., the combined services of the three tugs) with y (the services of the two Coast Guard vessels).

Appellant's columnar comparison of *Sea Fox's* performance with that of *Winona* and *Balsam,* therefore, is incomplete and misleading. The only issue which appellant is entitled to discuss is this: was the share allotted to the two Coast Guard vessels too low as against the share allotted to the *three* private tugs *as a group.*

Instead of spreading out a chronological history of what was done by *some* of the five vessels, let us take each of the five vessels, one at a time, and summarize what each one did. Then, let us compare the services of *Winona* and *Balsam,* as a group, with those of the three private tugs, *as a group.*

1. The *Winona* arrived on the scene at 0428 on November 17 and stood by. From 10 to 12 A. M. on the 17th she passed one end of her manila line to the *Herald* and the other to the *Sea Fox.* She did so in relatively moderate weather, by use of a line-throwing gun. (Eastman, Suppl. Apostles, 392-4.) She incurred no peril to herself whatever. She stood by until 0310 the next day, November 18, and then left, having stood by for 23 hours all told. She furnished a manila tow line, but did nothing else.

2. The *Balsam* arrived on the scene at 2140 (9:40 P. M.) on November 14 and stood by, doing nothing, until the *Neptune* was holed at 9 A. M. on the 16th, whereupon the *Balsam* took off the *Neptune's* crew. That afternoon she got a small manila line to the *Herald,* but the line broke almost immediately. The *Balsam* left on the 17th to take the *Neptune* survivors into port, and returned that same day. After the *Hercules* and *Sea Fox* were both hooked up to the *Herald* and it was found that the latter could not drop her anchor, *Balsam* loaned her a cutting torch with which the *Herald's* crew cut the chain.

In summary, the *Balsam* stood by for about 27 hours before the tow line parted, and for three days thereafter. Her actual services consisted of an unsuccessful attempt to tow, and loaning her torch to cut the *Herald's* anchor chain after *Sea Fox* and *Hercules* were ready to tow. The *Balsam* also took off the crew of the *Neptune* after it had been holed. This was a very meritorious service, but was rendered to the *Neptune* and her crew, not to the *Herald.* At no time did the *Balsam* incur any risk to herself or her crew.

3. The *Sea Fox* stood by, after the breaking of the tow line at 0040 on November 16, and tracked the drifting *Herald* throughout a very stormy night. When *Neptune* sank, she stood by the *Neptune* on orders from the Coast Guard. She then again tracked and located the *Herald.* After *Winona* had passed her line to *Herald* and *Sea Fox,* the latter headed into the seas and kept a strain on the line to prevent the *Herald* from dragging her only available anchor. This operation continued from the morning of the 17th to the morning of the 18th, when the *Hercules* got a line onto the *Herald* and the two tugs began to tow the ship to Puget Sound.

Thus *Sea Fox* pulled on the manila line for almost 24 hours to ease the strain on *Herald's* anchor chain, at a time when there was danger of the ship dragging toward shore. That it would have been very risky for the *Herald* simply to lie to one anchor was stated by all the witnesses. (Reichel, 145; Flagstad, 259; Sommers, 242 and 244.) The *Herald's* engineer, Belford, testified as follows:

> "Q. What was the weather as you were at anchor?
> A. She was blowing pretty good." (Apostles, 308.)

and again:

> "Q. I think I asked you this before, did you fear that you were going to drift ashore when you were at anchor?
> A. Yes." (Apostles, 319.)

The Coast Guard testimony likewise recognizes that the *Herald* would have been in great danger of dragging her one anchor had not the *Sea Fox* kept a strain on the manila line on the 17th and 18th. The Commanding Officer

of the *Balsam* evidently thought so, because his report to the Coast Guard, which brought the *Winona* to the scene, "stated that the position of the *Herald of the Morning* was such that she might drag anchor". (Eastman, Suppl. Apostles, 399.)

Capt. Eastman of the *Winona* went on to testify that when he arrived at the scene he was surprised to find the situation as good as it was, but his testimony shows that, at that time, he mistakenly thought the *Herald* had *two* anchors down. (Suppl. Apostles, 401.) That Eastman considered only *one* anchor *unsafe* clearly appears from his deposition, as follows:

> "Q. Would you be positive in your recollection that there were two anchors down—actually down, that is?
>
> A. Yes, I would, because of this: When we passed the hawser to the *Herald of the Morning,* they had two anchors down and I tried to get the message to them by voice that they were to leave their anchors down until the *Sea Fox* actually had the cable or the hawser fast on board, but while we were passing the hawser to the *Sea Fox* the *Herald of the Morning* let go one of their anchor chains so that it ran out through the hawse pipe, and I distinctly remember that because it caused me considerable alarm that the *Herald of the Morning* might drift, and in the conditions prevailing it would have been a very embarrassing situation, since the *Sea Fox* did not have the hawser secured at that time." (Suppl. Apostles, 401-2.)

Thus all witnesses agreed that the *Sea Fox* rendered a valuable service by holding the *Herald* on the 17th and

18th, since the *Herald* otherwise might well have dragged anchor and gone ashore. Capt. Sweeting of the *Herald* admitted that, "when we got the line, we were perfectly safe when we had the line from the *Sea Fox* * * * *I had worried up to that time,* but then when I had the *Sea Fox's* towing line, I had nothing to worry about. I was free from all worry." (Apostles, 334.)

Next, after holding the *Herald* for 24 hours, the *Sea Fox* got into irons when the *Hercules* passed her line to the *Herald* on the 18th, due to the fact that the *Herald* could not let go her one anchor chain. This caused both *Sea Fox* and *Hercules* to be carried around to where they were headed in the opposite direction to the *Herald,* side-by-side, with considerable danger of collision and with no power to maneuver, due to wind, seas, and the towing lines. (Reichel, 139-141; Flagstad, 257; Craig, 268-9.)

(When a tug, hampered by tow line, weather and/or the position of the tow, gets into a predicament where she will not answer her helm or maneuver readily, as sometimes happens, she is said to be "in irons".)

After the *Herald's* anchor chain was finally cut, the *Sea Fox* and *Hercules* then towed her on up to Puget Sound and into Everett, arriving there at 9:30 P. M. on the 19th. During this trip the weather grew worse on the 18th and was very severe for part of the time. Capt. Flagstad of the *Hercules* (Apostles, 258-9), mate Reichel of the *Sea Fox* (Apostles, 144-5) and mate Craig of the *Hercules* (Apostles, 267-8) testified that the weather again grew very rough on the 18th and they had to reduce speed.

The log of the *Herald* showed force 7 wind ("moderate gale") from 8 to 12 P. M. on the 18th. (Apostles, 333-4.) The log of the *Balsam,* which had more accurate means of measuring wind forces, shows for the 18th force 6 at 4 P. M., increasing to force 9 ("strong gale") from 9 to 12 P. M., with sea condition 4. (Exhibit to Schmitz deposition—sent up in original form but not printed in Apostles.)

4. The *Neptune* got the *Sea Fox's* distress message on the afternoon of the 14th and left at 4:15 P. M. for the scene, arriving there at 9 P. M. on the 15th. (Sprague, 196.) That night she tried, without success, to get a line to the *Herald,* and the next day she was sunk while valiantly trying to help the drifting *Herald* after the latter had broken loose during the night.

5. The *Hercules* left Seattle at 1:30 A. M. on the 17th, arrived off Grays Harbor at 11:30 P. M., and finally found the *Herald* some 10 to 12 miles offshore at 3 A. M. on the 18th. (Flagstad, 254-5.) She stood by until daylight, then got a line onto the ship at about 8 or 8:30 A. M. This was a rather difficult operation, due to the interference of the *Herald's* anchor chain and the manila line to the *Sea Fox.* (Sprague, 256-7; Craig, 269.)

As mate Craig of the *Hercules* testified:

> "Our men at times during the operation of getting our tow line aboard, were working in water which had come over the stern of the boat. One man was nearly washed overboard." (Apostles, 267.)

And again:

> "Q. Did you take any green water aboard while you were maneuvering, putting your line aboard?

A. We did on the weather side or port side of the vessel; we took green water aboard." (Apostles, 273.)

After her line was fastened to the *Herald,* the *Hercules* got into irons with the *Sea Fox,* as described above, and was subjected to the same peril. The trip from there to Everett was just as difficult for *Hercules* as for *Sea Fox,* as detailed above, and ended at 9:15 P. M. on the 19th.

To summarize, then:

1. The two government vessels spent a total of five and one-half days (*Winona* 1 day, *Balsam* 4½). The *Winona* loaned a hawser to the *Sea Fox* and put the other end onto the *Herald.* The *Balsam* loaned her cutting torch to cut the *Herald's* anchor chain on the 18th, and suggested that the *Herald* anchor at the 30-fathom curve on the 16th. No other *services* were rendered to the *Herald* by these vessels. *Neither of them incurred danger or sustained damage.*

2. The three tugs spent a total of 8 days (*Neptune,* 1½ days; *Hercules,* 3 days; *Sea Fox,* 3½ days). They all incurred a real peril to themselves, and the *Neptune* was sunk as a result of her efforts to help. The *Sea Fox* pulled on the manila line for 24 hours to keep the *Herald* from dragging anchor on the 17th-18th, and the *Sea Fox* and *Hercules* spent a day and a half towing the *Herald* to safety through more heavy weather when the *Herald* had no anchor left and would have been helpless had she again broken adrift.

It thus appears from the *facts* that the government vessels' services consisted chiefly of standing by, loaning two pieces of equipment, and giving one piece of advice, with no danger to themselves and no damage. The three

tugs did *all* the *work,* incurred considerable *peril,* and sustained a total loss of a tug worth $150,000 and the death of a member of the *Neptune's* crew.

Appellant's dramatic argument that without the *Winona's* hawser the *Sea Fox* could have done nothing overlooks the obvious fact that the hawser could do nothing without a boat. The man who lends his hammer to the carpenter renders a useful service, but the carpenter who uses the hammer to build a house makes the major contribution to the final result.

When all the relevant factors are fairly taken into consideration, we submit that the trial Court's allowance to the three tugs of three-fourths of the $60,000 for salvage services was entirely proper and within the bounds of judicial discretion which should not lightly be set aside here. This Honorable Court has properly pointed out in the case of *Joncich v. Xitco,* 172 F. (2d) 1003, that:

a. A salvage award represents both compensation for services and a reward in the nature of a bounty to encourage salvage efforts.

b. The trial Court, therefore, necessarily has a wide discretion in fixing the amount which is awarded as salvage, and is not to be overruled unless clearly in error.

CONCLUSION.

In reviewing this case, it should be kept in mind that all of the witnesses except the two Coast Guard men testified in open Court. After Judge Roche had thus had a chance to observe the witnesses and make an estimate of their credibility, the record was written up and the

case was submitted on written briefs. With all of these aids, Judge Roche then rendered a written opinion (Apostles, 38-54) which reviews the facts exhaustively and accurately, discusses the law very logically, and comes to a reasoned conclusion that the three tugs ought to get $45,000 all told, of which libelant should receive 55% for the *Sea Fox* and her crew.

That opinion by the District Court is a very able and well reasoned analysis of the facts and the law. We submit that it is in full accord with the weight of the evidence in the record, and that appellant has failed to demonstrate the "clear error" therein which this Court has repeatedly said must be shown to warrant a reversal. A salvage award cannot be measured in dollars and cents as accurately as a repair bill in a collision case, but must be left to the discretion of the trial Court.

That Judge Roche exercised his discretion wisely and reasonably, and that his decision should be affirmed as sound in fact and law, is

Respectfully submitted,

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Dated, San Francisco, California,
February 27, 1952.